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ALEXANDER
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82-58

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GRAND FALOON TAVERN, INC.,
a Florida corporation,

Petitioner,

v.

ROBERT WICKER, individually and
as Chief of Cocoa Beach, Florida,
Police Department, and DAVE BROWN,
individually and in his capacity as
Mayor of the City of Cocoa Beach, Florida,
and AGATHA DOERER, RICHARD EASLEY,
NANCY HUEY, and MARY FRANCES VAUGHN,
individually and as members of the
Cocoa Beach City Commission

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does a ban on non-obscene nude dancing in alcoholic beverage establishments, imposed by a municipality without power under the Twenty-First Amendment to the United States Constitution, violate the First Amendment to the United States Constitution.

2. Does the ordinance in question meet the requirements of *United States* v. *O'Brien*, 391 U.S. 369, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968).

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TABLE OF AUTHORITIES

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CASES:

Doran v. *Salem Inn, Inc.*,
422 U.S. 922, 45 L.Ed.2d 648,
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Schad v. *Borough of Mount Ephraim*,
452 U.S. 61, 68 L.Ed.2d 671,
101 S.Ct. 2176 (1981) 2

United States v. *O'Brien*,
391 U.S. 369, 20 L.Ed.2d 672,
88 S.Ct. 1673 (1968) 2, 3

OPINION BELOW AND APPENDIX

The Appendix in Petitioner's Brief contains the necessary rulings of the District Court and the Eleventh Circuit Court of Appeals. All references to Appendix shall be to Petitioner's Appendix and shall be designated as "App." with the page number following.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE LOWER COURT'S HOLDING AND PRIOR DECISIONS OF THIS COURT.

Petitioner's argument to create conflict rests on the conclusions that: (1) the lower courts decisions place "nudity alone" outside First Amendment protection, and (2) that now a municipality may enact an ordinance prohibiting nude dancing. Both conclusions are erroneous.

The District Court held:

> "Dancing even though performed nude or semi-nude involves an element of expression which entitled the activity to limited First Amendment protection at least as significant as that accorded commercial speech. *California* v. *LaRue*, 1972 409 U.S. 109, 118. Thus, to the extent that nude or semi-nude conduct involves experssion, the ordinance in question does affect a right protected under the First Amendment to the United States Constitution the concepts of which are made applicable to the state through the operation of the Fourteenth Amendment." App. at 18.

The Court of Appeals held:

> "The Cocoa Beach regulation of establishments where nude entertainment may be presented also has only an incidental impact on First Amendment rights. Compared to the "place" restrictions upheld in *Young*, the Cocoa Beach ordinance in the in-

stant case creates equally slight or even lesser impairments to the expression of and public access to information and ideas." App. at 31.

The crux of the Court of Appeals holding is not as Petitioner's argue, that because dancing involves conduct, First Amendment rights do not apply; on the contrary, it merely held that the communication elements in the facts of this case were not constitutionally and therefore impremissibly impaired by the limited place restriction required under the ordinance.

The error accorded Petitioner's second conclusion is that the Ordinance simply does not prohibit nude dancing in the City, nor was it the collective intent of the governing body to do so. (App. at 12) Nude entertainment may be presented in the City and Petitioners are free to offer this type of performance or expression at any place other than a tavern. Unlike the ordinance in *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1980), and *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 45 L.Ed.2d 648, 95 S.Ct. 2561 (1974), relied on by Petitioner for conflict, the restriction in the Cocoa Beach Ordinance does not result in a blanket prohibition, subjecting it to an overbreadth challenge.

There is no conflict with prior decisions of this Court. The opinion of the Court of Appeals is limited to the facts presented to the District Court and does not sanction or license a nationwide ban on topless dancing in bars absent the proof developed in this case.

II. THE RECORD IN THIS CASE SUPPORTS THE COURT OF APPEALS FINDING THAT THE ORDINANCE IS A VALID EXERCISE OF THE CITY'S POLICE POWER, APPLYING *UNITED STATES* V. *O'BRIEN.*

Petitioner's position on this point rests on the quantum of evidence before the lower court to support the application of *United States* v. *O'Brien*, 391 U.S. 369, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968). Applying Petitioner's logic to the question of the constitutional power of the City to regulate activity which has demonstrated a capacity to induce breaches of the peace would permit that activity to be conducted in a licensed

liquor establishment and arguably immunize it from control on the grounds that absent Twenty First Amendment powers, the local governing body has no authority. As pointed out by the Court of Appeals:

> "The presence in the instant case of the first part of the *O'Brien* test is not disputed." App. at 33.

The second question under *O'Brien*, does the ordinance further a substantial government interest, was stipulated to at pre-trial. (App. at 12) Petitioner argues that the record does not guarantee that the ordinance would have its desired effect but only that it "might."

The District Court correctly held on this point:

> "The fact that a statutory policy does not determine on an individual basis whether or not a given subject fits the purpose of the policy is of no constitutional moment so long as there is a rational relationship between the policy itself and the purpose sought to be accomplished." (App. at 19)

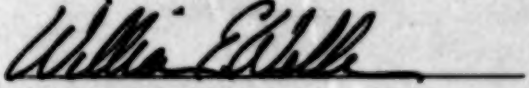
The Court of Appeals decision sets out those portions of the record which were deemed adequate to support the ruling of the trial judge. (App. at 36-38)

The last two elements of *O'Brien* were determined to be met by stipulation: the governmental interest was unrelated to supperssion of free expression; and, that separation as contrasted with total banning was the least burdensome approach that could have been chosen.

CONCLUSION

The Petition for Writ of Certiotati should be denied because there is no conflict between the holding of the Eleventh Circuit below and prior rulings of this Court. Nor has there been any departure from the accepted and usual course of judicial proceedings in the application of *O'Brien* in that the record amply supports the findings of the trial court.

Respectfully submitted,



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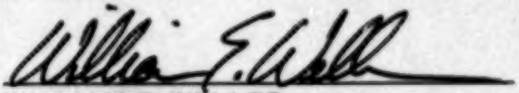
CERTIFICATE OF SERVICE

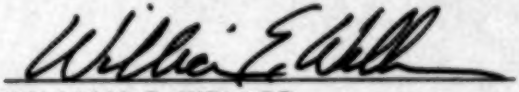
I HEREBY CERTIFY that on this 5th day of August, 1982, copies of this Brief In Opposition to Petition for Writ of Certiorari were mailed, U.S. Postal Service, to RICHARD L. WILSON, 1212 East Ridgewood Street, Orlando, Florida 32803. I further certify that all parties required to be served have been served.



WILLIAM E. WELLER

CERTIFICATE OF ATTORNEY

I, WILLIAM E. WELLER, hereby certify that I am a member in good standing of the Bar of the United States Supreme Court, and was admitted to practice by the Court on May 17, 1982.



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